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IN THE

# Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,

*Petitioners,*

*v.*

CSC HOLDINGS, INC. and
CABLEVISION SYSTEMS CORP.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF AMICI CURIAE THE PICTURE ARCHIVE COUNCIL OF AMERICA, INC., THE ENTERTAINMENT SOFTWARE ASSOCIATION, THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., THOMAS D. SYDNOR II, DIRECTOR OF THE CENTER FOR THE STUDY OF DIGITAL PROPERTY AT THE PROGRESS & FREEDOM FOUNDATION, AND THE PROPERTY RIGHTS ALLIANCE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI**

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## INTERESTS OF AMICI CURIAE[1]

The Picture Archive Council of America, Inc. is a non-profit organization of 150 stock photography libraries and agencies worldwide which license millions of images, illustrations, film clips, and other works protected by the Copyright Act (the "Act"), 17 U.S.C. § 101 *et seq.*, to newspapers, magazines, television companies, and others on behalf of thousands of individual authors, creators, and owners of those works, in return for appropriate license fees.

The Entertainment Software Association is a nonprofit trade association dedicated to serving the business and public affairs needs of companies that publish video games for game consoles, personal computers, handheld devices, and the Internet.

The American Society of Media Photographers, Inc. ("ASMP") is a trade association for professional photographers who make photographic images, primarily for publication. ASMP promotes photographers' rights through industry, judicial, and legislative advocacy; information and publications; and education. ASMP was founded in 1944 and has more than 5,000 members worldwide. ASMP has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Thomas D. Sydnor II is Director of the Center for the Study of Digital Property at The Progress and Freedom Foundation, a non-profit, 501(c)(3) educational foundation, which studies and provides educational information on the impact of digital and electronic media on public policy.

Property Rights Alliance is a project of Americans for Tax Reform, a 501(c)(4) tax exempt organization that represents the interests of American taxpayers at the federal, state, and local level. It seeks to emphasize the importance of maintaining private property rights, both physical and intellectual in nature, as well as highlighting the relationship between effective property rights law and economic development.

Amici support the petition for a writ of certiorari to review the Second Circuit's decision because of its importance to virtually all authors and owners of copyrighted works which make them available to the public for educational, informational, and entertainment purposes, particularly those who depend upon licensing fees and royalties for their livelihood and to support the creation of new works.

It is important to address the issues now because of the widespread and growing use of networked computer systems over the internet and closed systems for delivery of motion pictures, television programming, internet and home computer gaming software, entertainment and educational software, other audiovisual works, sound recordings, literary works, books, newspapers, periodicals and other copyrighted works.

## SUMMARY OF ARGUMENT

The Second Circuit erroneously reversed the careful decision of the district court, Pet. App. 43a, that Respondent Cablevision would be liable as a direct infringer of petitioners' copyrighted television programs and motion pictures.

The district court recognized that Cablevision developed and plans to operate an elaborate computer system to make multiple unauthorized copies of petitioners' works and transmit them for public performance to Cablevision's subscribers at their request, making it a direct infringer of petitioners' exclusive rights. 17 U.S.C. §§ 106 and 504.

The Second Circuit reversed, using a pinched construction of the Act to reach faulty conclusions. It concluded that only Cablevision's subscribers are "doing" the copying under its "volitional conduct" test, that copies in buffers in Cablevision's system are not copies because they fail to meet a novel "durational" test, and that the concededly unauthorized transmissions of petitioner's programming to Cablevision's subscribers "do[] not involve the transmission of a performance '*to the public*.'" Pet. App. 12a-18a, 22a-24a, and 28a-39a (emphasis added).

The court of appeals disregarded the fact that Cablevision designed and will operate its closed system for the sole purpose of making unauthorized copies and making public transmissions of petitioners' copyrighted works to its subscribers. *Id.* at 20a. No issues are presented concerning liability for secondary or

contributory infringement, or the defense of fair use under 17 U.S.C. § 107.

The Second Circuit misinterprets the term "fixed," 17 U.S.C. § 101, and reads into it a new "durational requirement." Section 101 provides that a work is "fixed" in a tangible medium "when its embodiment in a copy . . . , by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." By interpreting the phrase "for a period of more than a transitory duration" as a separate requirement, the Second Circuit has rewritten the Act in a way that will have long-term repercussions for authors and content owners.

The Second Circuit similarly misinterprets the Act's definition of public performance. Section 101 explains that "to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." The Second Circuit erroneously concludes that Cablevision's intended transmissions of unauthorized copies of petitioner's works to its subscribers are not "to the public."

The Court should grant the Petition because of the importance of the issues raised under the Act and because of conflicts with decisions of this Court and of other circuits.

Modern systems for distribution of digitally encoded copyrighted works—whether filmed, recorded, or written—depend on those responsible for running the distribution system to pay the authors or owners of the copyrighted works to license and use them. The Second Circuit's ruling threatens that entire system because it allows those operating such systems to evade license fees and liability as direct infringers altogether by simply claiming that only their customers are "doing" the infringing acts and only they are responsible for any direct infringement.

Cablevision has not yet begun operation of its so-called "Remote Storage DVR System." If left undisturbed, the court of appeals' erroneous decision creates strong legal incentives for Cablevision and others to create comparable systems for wholesale copying, dissemination, and performance of copyrighted works without license or compensation to their authors. Other distributors of copyrighted works will rely upon the Second Circuit's contorted conclusion that liability under the Act falls only on end-users. Given the speed of adoption of new computer technologies, such systems will undoubtedly spread like wildfire.

Copyright owners should not be reduced to pursuing infringement claims against individual end users. The financial markets' recent convulsions demonstrate that subdividing risks into small widely dispersed increments only delays injury when their cumulative effects rock the entire system. The Court should address the issues presented by this technology now, while it is in its infancy, to avoid the wholesale and perhaps irreparable infringements that will result.

Almost all authors and owners of copyrighted works, and their licensors, including the members of the *amici* herein, are therefore at risk of massive infringements by the development and use of closed systems like Cablevision's, or similar systems over the internet. The Court should grant review and establish Cablevision's liability as a direct infringer before such infringing systems become pervasive and virtually impossible to shut down.

## STATEMENT

### A. Cablevision Designed and Will Operate A Closed Computer Server System for the Sole Purpose of Making Unlicensed Copies of Petitioners' Copyrighted Works.

Cablevision is a cable-television operator which provides television and motion picture programming to its subscribers through set-top boxes for television sets, set-top digital video recorders, and a video on demand system. Cablevision pays license fees to the authors or owners of these copyrighted works for these various types of uses pursuant to the compulsory license for secondary transmissions of signals from specified broadcast television stations, 17 U.S.C. § 111, and under negotiated license agreements for Cablevision's transmission of other specific types of content and uses, including any right to make copies, delay, or modify transmissions. *See* Pet. 5.

Cablevision announced in March 2006 that it would begin offering a new service – "Remote Storage DVR System" (the "System") – to its subscribers for an

additional fee. The System would allow Cablevision subscribers to use their home remote control device, also provided by Cablevision, to request that Cablevision make copies of television and motion picture programming on Cablevision's System and retransmit this programming later upon request.

Neither Cablevision's compulsory license, 17 U.S.C. § 111, nor its negotiated license agreements authorize Cablevision to make copies and transmit performances of the works under its new System. Pet. App. 46a. Cablevision does not intend to seek further authorization or to further compensate the authors and owners of these works for these additional uses. *Id.* at 44a.

**B. Cablevision Will Make Unauthorized Copies and Transmit Public Performances Requested by its Subscribers.**

Cablevision deliberately created and designed the System in such a way that it could argue that it is not directly responsible for the unauthorized copying and performance of copyrighted television and motion picture works.

Cablevision's System consists of a large computer system designed to make and store an individual copy of television and motion picture programming for each of its subscribers who requests that Cablevision make such a copy prior to or when this programming is delivered live over the cable network system.

Under the Second Circuit's novel ruling, this massive copying of petitioners' copyrighted works is not being "done" by Cablevision, despite the fact that the unauthorized "copies," Pet. App. 26a-27a, as defined in the Act, 17 U.S.C. § 101, are made using machinery not located in its subscribers' homes, but instead on Cablevision owned-premises and stored on the physical hard drives and other equipment within Cablevision's System.[2]

For those copies to arrive in Cablevision's servers, Cablevision diverts the live television cable signal through a series of computer buffers. First, a complete copy of all programs on all channels are stored in a buffer for a brief period of time. That buffer transmits an entire copy of the programming to a buffer in a separate server (the "primary ingest buffer"). The primary ingest buffer identifies whether any subscriber has requested copying of the programming and transmits a copy of any selected programs to a second buffer within the server. There, duplicate copies are generated for each customer and transmitted to multiple hard drives in Cablevision's System, where a copy of each requested program is fixed, for later transmission to each requesting subscriber. Pet. App. 5a.

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[2] The Second Circuit, Pet. App. 21a, made distinctions between human actions and acts of machines that Congress long ago rejected. H.R. Rep. No. 94-1476, at 52 (1976) ("it makes no difference what the form, manner, or medium of fixation may be . . . and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'").

Cablevision's subscribers use Cablevision's supplied remote control to request that Cablevision transmit the selected copyrighted works from the copies made by Cablevision on its hard drives. The Second Circuit's opinion focused solely on whether this transmission of individual programs from Cablevision's hard drives to its subscribers for viewing constituted a performance "to the public." The Second Circuit did not analyze whether the transmissions of individual programs from the first buffer to the second buffer, or from the second buffer to the hard drives, supposedly controlled only by subscribers, also constituted a performance "to the public." Pet. App. 41a.

## REASONS FOR GRANTING THE PETITION

### I. The Second Circuit's Analysis and Conclusions Are Contrary to Decisions of This Court and Conflict with Other Circuits.

This case requires examination of fundamental principles under the Act. "*Anyone* who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . ." 17 U.S.C. § 501(a) (emphasis added). The district court, Pet. App. 72a, correctly held that Cablevision would be liable as a direct infringer for its own acts in making unauthorized copies of petitioners' copyrighted works in buffers and on hard disks in Cablevision's System and for "perform[ing] the copyrighted work[s] publicly . . ." in violation of petitioners' "exclusive rights to do and to authorize . . ." such acts. *Id.* at § 106(1) and (4). The Second Circuit erroneously reversed.

Copyright infringement is a strict liability statutory tort; intent to infringe is not required, only an act by Cablevision in violation of petitioners' exclusive rights. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931) (applying 1909 Copyright Act); 3 *Patry on Copyright* § 9:5 at 9-19 (2008). The fact that a third party requests you do an act in violation of Section 106 does not protect you from liability as a direct infringer; if you perform the act, you are a direct infringer. *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1113 (2d Cir. 1986) (printer of infringing book made at request of third party liable as direct infringer, even if innocent). Here, the Second Circuit inappropriately reads a "volitional" requirement into Section 501(a), relying upon internet service provider cases that have no bearing here, Pet. App. 19a-22a, disregarding prior Second Circuit precedent, and implicitly inserting an intent requirement into the Act where none exists.

The Second Circuit erroneously concludes that this case is governed by *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony Betamax*") by analogizing Cablevision's elaborate System to a simple, consumer-owned and controlled Betamax or VHS machine. The court of appeals disregarded this Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), which held that publishers and online providers of copyrighted works were direct infringers, even though the subscribers to the online services actually initiated the viewing and any copying of the unauthorized works on the website. The Second Circuit also failed to appreciate the significance of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 543 U.S. 913 (2005), in

evaluating Cablevision's conduct here (even though *Grokster* was presented as a contributory, not direct infringement case).

The Second Circuit's analysis of "copying" and transmission of public performances is also contrary to the decisions of other circuits, as explained below and in the Petition.

## II. The Case Presents Vital Issues Concerning the Direct Liability Under the Copyright Act of Parties Who Create and Operate Computerized Systems Which Make Unauthorized Copies and Transmit Public Performances of Copyrighted Works.

The digital revolution and the emergence of the internet continue to present new challenges for protection of the exclusive rights of authors and owners of copyrighted works under the Act. Following *Sony Betamax*, a series of cases have involved systems created to evade liability under the Act for infringement. *See Grokster*, *supra*; *Tasini*, *supra*; *In re: Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 543 U.S. 1180 (2005); *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

Cablevision's System is a giant step backwards to such earlier attempts to feast on copyrighted works without compensating their authors and owners. The System is not remotely comparable to Sony Betamax machines, as Cablevision contends. It is a closed system operated and controlled by Cablevision. It has no purpose or function other than diverting unauthorized

public performances of petitioners' copyrighted works to its System, where Cablevision then makes and stores multiple unauthorized copies for later transmission of unauthorized performances "to the public," *i.e.*, its subscribers.

In *Grokster* and *Napster*, the courts invalidated efforts by enterprising infringers which were costing copyright authors and owners dearly. But the years required to determine the illegality of such systems delayed the commercial impetus to develop and introduce legitimate systems. Subsequently, companies such as Apple Inc. and others developed legitimate systems for efficient and inexpensive delivery of copyrighted works such as *iTunes* and *Rhapsody*, eventually meeting consumers' desires and protecting copyright authors' and owners' rights and livelihoods. The delay substantially damaged the American and worldwide music recording industry and musical artists.

The television, photography, video game and publishing industries should not have to suffer the same delay in resolving the basic issue of who is primarily responsible for unauthorized use of copyrighted works which is vividly presented by Cablevision's System. If the owners and operators of comparable computer systems can avoid direct liability by blaming their end users for any infringement, presumably they will, like Cablevision, seek to avoid contributory or vicarious liability by claiming that the non-commercial end users are engaged in fair use. Such a conclusion would render irrelevant the entire notice and takedown mechanism established by the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c) ("DMCA").

The Court should therefore address the issues presented in this case now. Absent review, Cablevision's System will be implemented not only by Cablevision, but will provide a template for others to follow. Yao, Deborah, *Cable, Led By Cablevision, Mulls Network DVR*, USA Today, Sept. 19, 2008.[3] The Second Circuit's decision provides a roadmap for distributors of copyrighted content in a broad range of industries to develop comparable systems protected from liability for direct infringement. Such systems will affect authors and owners of photographic images, video games, sound recordings, and digital copies of literary works, including books, magazines, newspapers, and software owners and developers.

The Second Circuit's decision restricts direct infringement of copyrighted works to tiny increments, as the only people liable for infringement are individuals at home in their basements and TV rooms. As with the

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[3] Some less elaborate systems have been attempted on the internet, and there have been or are cases pending in the district courts involving websites and software of parties similarly seeking to avoid infringement liability for storing music recordings in individual internet "lockers," *Capitol Records, Inc. v. MP3 Tunes, LLC*, 07 Civ. 9931 (S.D.N.Y.), posting unauthorized scanned copies of current magazines, *Time, Inc. v. Budd*, Docket No. 08-cv-7392 (S.D.N.Y.), unauthorized transmissions of television programming over the internet, *Twentieth Century Fox Film Corp. v. iCraveTV*, 2000 WL 255989 (No. Civ. A 00-120, 00-121) (W.D. Pa. Feb. 8, 2000) (granting preliminary injunction), and retransmitting live internet webcasts of racing events without authorization. *Live Nation Motor Sports, Inc. v. Davis*, 2007 WL 79311 (06-CV-276-L) (N.D. Tex., Jan. 9, 2007).

securitization of mortgages, if only a multitude of individual infringers are liable, that increases the risk that copyright owners' rights cannot be effectively and inexpensively protected. In fact, the Act provides direct remedies against those who institute or have the ability to control such infringements.

The Court should grant the Petition now because the Court has the opportunity to address the legality of Cablevision's new System prior to its actual implementation. If the Court does not address the issue now, infringing technologies could become entrenched throughout the television and other copyright-based industries. Given the increasing speed by which infringing technologies have been created and used, stopping the System before it is rolled out is imperative.

Those who create, operate and benefit from these systems should not be allowed to escape responsibility for their own acts of infringement by blaming their subscribers.

## III. The Second Circuit's Conclusion That Cablevision Would Not Be a Direct Infringer Misconstrues the Plain Language of the Copyright Act.

The Act provides that "[*a*]*nyone* who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . of the author." 17 U.S.C. § 501 (a) (emphasis added). Under Section 106 (a)(1) and (4), "the owner of copyright . . . has the exclusive rights

*to do and to authorize* any of the following: (1) to reproduce the copyrighted work in copies . . ." and (4) "in the case of literary, musical, dramatic, and choreographic works, and pantomimes, and motion pictures and other audiovisual works, perform the copyrighted work publicly . . ." (emphasis added).

The Second Circuit disregarded this plain statutory language and renders Cablevision immune from direct liability by concluding that end-users could "authorize" Cablevision to perform these actions. As the district court correctly held, the following actions carried out by Cablevision's system render it liable as a direct infringer of petitioners' copyrights: (1) making copies on Cablevision's System hard drives; (2) making copies of portions of petitioners' works in temporary data buffers en route from Cablevision's live feed television signal to its System; and (3) transmitting unauthorized performances of petitioners' works to the public, *i.e.*, Cablevision's subscribers. Pet. App. 44a-45a.

Cablevision's actions are not authorized under either compulsory or negotiated licenses; Cablevision is a direct infringer.

## IV. The Second Circuit Misconstrues the Definition of Copying in the Copyright Act by Concluding that Neither the Unauthorized Buffer Copies Nor the Hard Disk Copies Made by Cablevision's System Are Infringing.

The Act defines "[c]opies" as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101.

The Second Circuit erroneously concluded that the buffer copies were not infringing because they did not meet a supposed overall "durational" requirement in the definition of "fixed" in the Act. 17 U.SC. § 101. Pet. App. 18a. The lower court's conclusion is based upon misconstruction of the first sentence of the definition and disregard of the second sentence. The first sentence provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Though the portion of the work stored in the buffers is for only a few seconds, that is "sufficiently permanent or stable to be perceived, reproduced, or otherwise communicated . . . ," *id.*, because the signal continues on in Cablevision's System where they are "fixed" as "copies" for indefinite storage on its hard drives.

The Second Circuit misread the Act's definition of "fixed" to mean that the phrase "for a period of more than transitory duration" modifies not only the term "communicated," but also the terms "reproduced" and "perceived." This construction does not make grammatical sense and violates the "last antecedent" principle of statutory construction. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005) (recognizing that a limiting clause or phrase ordinarily modifies only the noun or phrase that it immediately follows under the rule of the "last antecedent").

In addition, the second sentence of the definition of "fixed" provides that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if "a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101. Here, Cablevision makes multiple copies of petitioners' works on its hard drives simultaneously with their transmission through the buffer. Pet. App. 5a.

The Second Circuit's decision conflicts with other circuits. In *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), the Ninth Circuit held that, where stored data is capable of being "perceived, reproduced, or otherwise communicated," even if only temporarily, it has been embodied long enough to be "fixed" under the Act. This approach has been adopted by other circuits and followed in district courts. *Storage Tech. Corp. v. Custom Hardware Eng. & Consulting, Inc.*, 421 F.3d 1307, 1311 (Fed. Cir. 2005); *Stenograph L.L.C. v. Bossard Assoc. Inc.*, 144 F.3d 96, 101-102 (D.C. Cir. 1998); *accord, Marobie-FL, Inc. v. National Assoc. of Fire*

*Equip. Distr. and Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997); *In re Indep. Serv. Org. Antitrust Litigation*, 910 F. Supp. 1537, 1541 (D. Kan. 1995); *Adv. Comp. Serv. of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 364 (E.D. Va. 1994).

Here, various layers of digital buffer copies remain stored in Cablevision's System long enough for Cablevision to copy and transmit them upon its customers' requests. This falls squarely within the *MAI Systems* rule. The Second Circuit erroneously held the buffer copies were not "fixed" by concluding that its novel "durational requirement" was not at issue in *MAI Systems* and its progeny. Pet. App. 13a. This conflict in the circuits requires resolution now.

The Second Circuit concluded that the buffer copies, which Cablevision conceded it "made," do not constitute a "copy" under the Act. The conclusion that Cablevision is not a direct infringer thus depends on the fiction that it is Cablevision's subscribers who would be "doing" the copying on Cablevision's hard drives. Pet. App. 26a-27a. This flies in the face of reality and the plain language of the Act because it reads a "volitional requirement" into the Act – improperly requiring proof of intent in a strict liability tort.

Cablevision created its expensive and sophisticated System for the sole purpose of making copies of petitioners' works, storing them, and retransmitting public performances of them to its subscribers for a fee, while attempting to evade its obligation to obtain authorization from petitioners to do so and to pay them

any agreed compensation for these additional uses of petitioners' works.

This System is owned, operated, and subject to the exclusive control of Cablevision, not its subscribers. Cablevision chooses the content which it permits to be copied, replicates the data stream containing the television programs and the motion picture content, and transmits those streams from its primary ingest buffer to the multiple hard drives in its servers, where each of the multiple data streams is stored. Cablevision later transmits the various copies from Cablevision's hard drives to subscribers upon request. No transmission can occur unless Cablevision chooses to, and then makes it happen, regardless of its subscribers' requests.

Copyrighted works are incorporeal, but "copies" under the Act are physical objects, 17 U.S.C. § 101. It is Cablevision which "makes" unauthorized copies of the works by transmitting them in a data stream and making "copies" on the hard drives in its System.

The district court correctly rejected Cablevision's argument that its System is the functional equivalent of a Sony Betamax machine, a contention which verges on the frivolous, given the complexity of Cablevision's System and the fact that it is under Cablevision's dominion and control. Pet. App. 67a. Individual consumers purchase, own, and completely control the operation of home copying machines such as the Sony Betamax. Such machines are staple articles of commerce which have substantial non-infringing uses and are completely controlled by their owners. *Sony Betamax, supra.*

Cablevision unlawfully siphons off copyrighted works from live television streams and makes unauthorized copies on Cablevision's System. Cablevision then transmits unauthorized performances of those works from its unlawful hard disk copies to its subscribers – members of the public – upon request.

Subscribers do not purchase a machine which they own and control, as in *Sony Betamax*; Cablevision makes copies on its System and transmits the public performances from that System to its subscribers, upon request. These acts by Cablevision violate its compulsory license, 17 U.S.C. § 111, and its negotiated agreements with petitioners, and constitute direct infringement. 17 U.S.C. § 501(a). This takes place without any compensation to petitioners for these additional uses of their copyrighted works.

## V. The Second Circuit Misconstrues the Definition of Public Performance by Concluding That Cablevision's Unauthorized Transmission of Petitioners' Copyrighted Works to Cablevision's Subscribers From Its System's Hard Disks Is Not a Performance "To the Public."

Cablevision would also infringe petitioners' exclusive right of public performance by transmitting public performances of petitioners' copyrighted works from the copies fixed on the hard drives in Cablevision's System, 17 U.S.C. §§ 101, 106(a)(4), 504, as the district court correctly held. Pet. App. 79a-80a.

The Second Circuit erroneously held that Cablevision would not infringe petitioners' performance

right because it concluded that playing the programming from Cablevision's System hard disks "does not involve the transmission of a performance 'to the public.'" Pet. App. 28a.[4] *See* 17 U.S.C. § 101.

Cablevision designed a system that clearly transmits "a performance" of petitioners' works, upon request of its subscribers. 17 U.S.C. § 101 ("To 'transmit' a performance or display is communicated by any device or a process whereby images or sounds proceed beyond the place from which they are sent.").

Cablevision's transmission of petitioners' works satisfies the definition of "[t]o perform or display the work publicly . . . ." 17 U.S.C. § 101. This is clear from the plain language of the Act and its legislative history. The definition of a public performance in the "transmit" clause includes "to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *Id.*

In a unanimous opinion by Justice Brandeis in *Buck v. Jewell-La Salle Realty Co.*, *supra*, the Court held that the defendant hotel was performing plaintiffs'

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[4] The Second Circuit did not address Cablevision's contention that it would not be a direct infringer because its subscribers would be "doing" the performing by use of their remote controls, the same argument advanced to evade direct liability for copying. The logic of the Second Circuit's analysis would seem to apply, though the court opined that it "does not dictate a parallel conclusion . . . ." Pet. App. 28a.

copyrighted works without authorization because the hotel operated a master radio receiver from which it transmitted live radio broadcasts to speakers in public rooms and to private guest rooms where its guests could choose to listen to the broadcasts. 283 U.S. at 195-96, 197-98.[5]

The Court in *Buck* had no doubt that the hotel was the "actor" which caused the performance and was thus a direct infringer:

> The guests of the hotel hear a reproduction *brought about by the acts of the hotel* in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud-speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and

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[5] *Buck* was limited to its facts by a divided Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397 n. 18 (1968). The Court in *Fortnightly* held that community antenna television ("CATV") systems, which captured live broadcast signals on towers and transmitted them to homes through cables, were not "performing" the programs, which were authorized for broadcast, but not for retransmission (applying the 1909 Copyright Act).

"Congress had the last word . . . , reversing *Fortnightly*, *Teleprompter*, and *Aiken* on the meaning of 'performance' in the 1976 Act, adopting instead *Buck's* approach." 4 *Patry on Copyright* § 14:6 at 14-21 (2008). Congress also made it clear that cable companies would be liable as direct infringers for unauthorized acts in violation of the exclusive rights in 17 U.S.C. § 106, if outside the scope of the compulsory license in 17 U.S.C. § 111.

> that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose. In each *the music is produced by instrumentalities under its control.*

*Buck*, *supra*, 283 U.S. at 200 (emphasis added; footnote omitted). This analysis as to who is the "actor" applies here. Cablevision owns, controls and operates the System which makes the copies of petitioners' programs and from which the transmissions of performances to the public are made. Cablevision would clearly be a direct infringer in the operation of its System.

The Second Circuit's analysis is also contrary to the legislative history. Transmission of a public performance includes "the case of sounds or images stored in an information system and capable of being performed or displayed *at the initiative of individual members of the public.*" H.R. Rep. No. 90-83, at 29 (1967) (emphasis added). That is precisely the case here.

The Second Circuit erroneously compartmentalized the process in Cablevision's System, concluding that the transmissions from its hard drives to subscribers are not "to the public," but merely "non-public transmissions" or "purely private transmission[s]." Pet. App. 32a-33a. The Second Circuit previously rejected this analysis in *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (PrimeTime liable for public performance of NFL programming uploaded to satellite in the United States and downloaded to Canadian subscribers).

The court in *PrimeTime* recognized that "the most logical interpretation of the Copyright Act is to hold that a public performance or display *includes each step in the process by which a protected work wends its way to its audience.*" *Id.* (emphasis added; internal quotations and citations omitted).[6] It rejected PrimeTime's contention that the "performance" occurred only during the downlink to Canadian subscribers, *id.* at 12, relying upon *WGN Cont. Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) (the Act defines "perform" broadly enough to include intermediate cable carrier's transmission of programming through secondary cable systems and thus indirectly to the ultimate public).

The Second Circuit here took the opposite approach, concluding that there are only individual performances, not performances "to the public." This ignores the intermediate transmissions that occur when Cablevision copies and diverts the original television signal to the buffer copies and then copies the works contained in those signals onto Cablevision's hard disks for later transmission to is subscribers. The Second Circuit's disregard of its precedent in *PrimeTime* also conflicts with the Seventh Circuit's decision in *WGN Cont. Broadcasting Co., supra.*

The Second Circuit's conclusion that only individual, private performances occur in the Cablevision System

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[6] Congress contemplated complex transmission systems: "'The definition of 'transmit' . . . is broad enough to include *all conceivable forms and combinations of wires and wireless communications media*, including but by no means limited to radio and television broadcasting as we know them." H.R. Rep. No. 94-1476, at 64 (1976) (emphasis added).

also conflicts with other circuits. *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 158-59 (3d Cir. 1984) (transmitting movies from video cassettes to booths for viewing by members of public in defendants' store constituted public performances; closing booth door signaled employee to insert cassette and start machine); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (hotel transmitted performances to public with system that enabled guests to select and start playing movies with remote control that activated hotel's video cassette system). These courts analyzed the entire process, including viewing of the same videocassette by later viewers. Contrary to those decisions, the Second Circuit focused only on the final stage in the distribution, not Cablevision's earlier division of one signal into thousands, each of which it transmits to a hard drive destined for a different home. Those transmissions of those identical signals within the System allow thousands of Cablevision subscribers to view the performances at a time of their choosing. Those internal transmissions constitute public performance by Cablevision.

In sum, the scope of liability for direct infringement under the Act is vital to all authors and owners of copyrighted works, most of which can now be digitized, stored, and electronically transmitted. The case is ripe for review because Cablevision's System has not yet been implemented, because of the importance of the issues, and because the Second Circuit's decision is contrary to the Act, its legislative history, and decisions of this Court and other circuits. Determination of the scope of direct infringement at this stage will reduce

the likelihood of widespread infringements through the use of Cablevision's and comparable systems which can never be fully compensated once they become widespread and entrenched.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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